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IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No. 163 MISC.

JOSEPH S. DE VIVO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated, New York, August 21, 1957.

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IN THE

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OCTOBER TERM—1957

No.

JOSEPH S. DEVIVO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH S. DEVIVO, the petitioner, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 9, 1957, which affirmed a judgment of conviction in the United States District Court for the Southern District of New York.

The indictment originally included three counts and three other defendants, John Pagano, Sam Perrone and Anthony J. Potenza. The first count, which charged theft from an interstate shipment (18 U. S. C. §659), was dismissed as to petitioner DeVivo by the trial judge at the end of the government's case. Count 2 of the indict-

ment charged that on November 6, 1956, petitioner had such goods in his possession, knowing the same to have been stolen (18 U. S. C. §659, §2). Count 3 charged that the petitioner conspired with the other defendants to steal and possess merchandise from a truck moving in interstate commerce (18 U. S. C. §371). In his charge to the jury, the Trial Court withdrew from its consideration as to Petitioner conspiracy to steal and limited the charge to conspiracy to possess (69A).*

Defendants Pagano, Perrone and Potenza all pleaded guilty at the end of the government's case. Pagano and Perrone received sentences of four years imprisonment, while Potenza received two years, execution suspended.

The petitioner was convicted on counts 2 and 3 and was sentenced to four years imprisonment on each count, to run concurrently.

Citations of Opinions Below

The opinion of the Court of Appeals, printed in Appendix A hereto, has not yet been reported.

No opinion was rendered in the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on July 9, 1957.

On August 2, 1957, Mr. Justice Frankfurter granted petitioner's application for an order extending his time to file a petition for a writ of certiorari to and including August 15, 1957. A further extension to August 22, 1957,

* Numbers in parentheses followed by the letter "A" refer to pages of petitioner's appendix in the court below; numbers followed by the letter "a" refer to pages of an appendix filed by the government in the court below. Other references are to the stenographer's minutes.

was granted by Mr. Justice Frankfurter on August 13, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 subd. 1, and Rule 22 subd. 2.

Questions Presented

1. May a defendant be convicted as a participant in a conspiracy to possess merchandise stolen from an interstate shipment in the absence of evidence of any such agreement on his part or knowledge that the stolen merchandise originated from an interstate shipment?

2. May a defendant be convicted for possessing merchandise stolen from an interstate shipment because of his repeated presence, with others, in the house where the stolen goods are stored, but in the absence of the commission of any overt act by the defendant, or other evidence of control, dominion or authority over the stolen merchandise?

Statutes Involved

Title 18 U.S.C. §659, so far as relevant, provides:

> "*Interstate or Foreign Baggage, Express or Freight.*
>
> "Whoever • • • unlawfully takes, carries away or conceals, • • • from any • • • motor truck, or other vehicle, • • • with intent to convert to his own use any goods or chattels moving as or which are part of or which constitute an interstate shipment of freight or express; or
>
> "Whoever • • • receives or has in his possession any such goods or chattels, knowing the same to have been • • • stolen; • • •

"Shall in each case be fined not more than $5000. or imprisoned not more than ten years or both * * *"

Title 18 U.S.C. §2, provides:

"*Principals.*

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

Title 18 U.S.C. §371, provides:

"*Conspiracy to Commit Offense or to Defraud United States.*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000. or imprisoned not more than five years, or both."

Statement of Facts Material to the Questions Presented

On October 17, 1956, a shipment of 1787 cases of Vitalis hair tonic valued at about $30,000 left Syracuse, New York, destined for Hillside, New Jersey (31). On October 18, 1956, the truck was stolen in New York City by defendant John Pagano (8a-9a), and later that day its contents were unloaded by defendants Pagano, Perrone

and Potenza at a vacant store in the Bronx, New York (14a-15a). This store, in the basement of a rooming house (10a, 14A), had been rented from a Mrs. Marguerite Schaefer by Pagano, using the assumed name John Blowitz, three days earlier, on October 15, 1956 (12a-13a).

A day or two after October 15, 1956 (5A-6A), petitioner DeVivo accompanied Pagano to the premises, and was introduced to Mrs. Schaefer by Pagano as "This is my friend" (9A). According to Mrs. Schaefer, DeVivo visited the premises either with Pagano, or inquiring for him, about seven or eight times* (11A), but he was not present when the stolen Vitalis was unloaded (14a-15a).

One of the visits occurred on the night of November 4, 1956 (28A). Earlier that day the petitioner had accompanied Pagano to a junk yard in Newark, New Jersey, where arrangements were made to buy some cosmetics, consisting of hair tonic, shampoo, shaving cream and tooth paste (27A, 30A-34A). This was a separate, independent transaction, unrelated in any way with the stolen Vitalis. There was no evidence that this merchandise was stolen.

The cosmetics were brought to the Bronx address by Pagano, petitioner DeVivo, the witness Mucchiello, and two others, not defendants (38A-39A). The merchandise was unloaded outside at the door (40A), and Pagano alone took it inside the store (40A), while the others retired to a restaurant (40A-41A). Later, Pagano made arrangements with Mucchiello and his associates from Newark for payment (41A).

F.B.I. Agent Durkin testified that on November 6, 1956, he saw Pagano and petitioner DeVivo as they rang the bell to speak to Mrs. Schaefer (18A). As they left the house,

* Mrs. Schaefer also testified that petitioner had been there "maybe seven, eight times, nine times; I can't be sure" (7A). "Maybe five, maybe six, I don't remember" (9A).

he and another agent stopped and questioned them (19A-20A). DeVivo identified himself correctly and said that he was there to rent a room that night (22A). He admitted to having been at the premises on two previous occasions (20A), but denied having been in the cellar store, or any knowledge of any stolen Vitalis (24A).

The trial occupied six days and some 650 pages of testimony. Forty exhibits were introduced and eighteen witnesses testified for the prosecution, of whom only three—Mrs. Schaefer, Mucchiello and Agent Durkin—referred in any way to petitioner DeVivo. There was no testimony or other proof that DeVivo was ever in the cellar store, or that he ever saw, discussed or knew of the stolen Vitalis. Mrs. Schaefer's sole conversations with petitioner were an occasional greeting, and his inquiries as to Pagano's whereabouts (11A-12A). Neither was there any testimony that DeVivo had participated in or had any knowledge of the theft of the truck, and the trial court withdrew from the jury the portion of the indictment referring to conspiracy to steal, and limited the charge to conspiracy to possess (69A).

The defense called no witness, and rested on the government's case.

Reasons for Granting the Writ

The Court of Appeals, in deciding this case, has:

1. Decided a federal question in a way in conflict with applicable decisions of this Court and other courts of appeal; and

2. Sanctioned rulings in the District Court constituting such departures from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I.

Despite "repeated warnings" of this Court that it will "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions," (*Grunewald* v. *United States*, 325 U. S. 866), the Court of Appeals stretched the "catch-all" of conspiracy beyond any point ever sanctioned by this Court, and thus in conflict with the clear intendment of its decisions and those of courts of appeal in other circuits. Boiled down, the evidence which the court below held justified petitioner's conviction for conspiracy to possess merchandise stolen from an interstate shipment was:

1. The presence of petitioner, with co-defendant Pagano, on a number of occasions at the house where the stolen merchandise was stored;

2. The allegedly false statement by petitioner to an F.B.I. agent on his arrest, that he was there only three times instead of the larger number testified o by Mrs. Schaefer;

3. The suspicious manner in which the Mucchiello transaction was handled.

There was no evidence that petitioner was a party to any agreement with knowledge that the merchandise involved came from a theft of an interstate shipment. In the absence of such evidence this case would establish a precedent for conspiracy convictions in conflict with, among others, *Dodson* v. *United States*, 6 Cir., 215 F. 2d, 196; *United States* v. *Wainer*, 7 Cir., 170 F. 2d, 603; *United States* v. *Sherman*, 2 Cir., 171 F. 2d, 619; cert. den. sub. nom, *Grimaldi* v. *United States*, 337 U. S. 931; *Fulbright* v. *United States*, 8 Cir., 91 F. 2d, 610.

In the Court below, *Wilkerson* v. *United States*, 7 Cir., 41 F. 2d, 654; cert. den. 282 U. S. 894, was cited in the government's brief (page 18) as authority that "there is no requirement of proving that the criminals knew of the interstate character of the goods for either the substantive offense or the conspiracy to commit that offense." Apparently this statement, in conflict with the later authorities cited above, was accepted and followed by the Court. Thus it would seem compelling that there should be an authoritative determination by this Court on this constantly re-occurring question.

II.

In sustaining the conviction for the substantive offense of possessing merchandise from an interstate shipment knowing the same to be stolen, the court below held that the same evidence outlined in the previous point, that is, without any overt act on petitioner's part or other evidence of ownership, control, dominion or authority, or aiding and abetting, was sufficient to establish guilt. This, too, is in conflict with applicable decisions of his Court and other circuits, and establishes a new standard and precedent for convictions in such cases. Prior to this case it had been uniformly held that "aiding and abetting means to assist the perpetrator of the crime;" that merely to be present where a crime is being committed is not evidence of guilt as an aider and abettor. Cf. *United States* v. *Williams*, 341 U. S. 58; *Nye & Nissen* v. *United States*, 336 U. S. 613; *United States* v. *Carengella*, 7 Cir., 198 F. 2d, 3; *United States* v. *Wainer*, 7 Cir., 170 F. 2d, 603; *Dodson* v. *United States*, 6 Cir., 215 F. 2d, 196; *United States* v. *Bates*, 7 Cir., F. 2d, 436; remanding case for further action, 323 U. S. 15.

The fact that petitioner was present on a number of occasions at the house (not in the room) where the stolen merchandise was stored and minimized the number, when questioned by an F.B.I. agent on his arrest, could mean that "he may have had a guilty conscience about something," *United States* v. *Carangella, supra* (possibly the Mucchiello transaction which was not involved in the indictment), but to hold that such conduct will buttress a conviction is in conflict with previously established law in other circuits. See *Fulbright* v. *United States, supra; United States* v. *O'Brien*, 7 Cir., 174 F. 2d, 341.

III.

The decision of the court below that a jury may infer guilty knowledge of a conspiracy to possess goods stolen from an interstate shipment, and aiding and abetting in such possession, from the fact that the defendant assisted one of the defendants in a separate, independent transaction involving the purchase of merchandise,—presumably legitimate,—and its delivery to the premises where the stolen merchandise was stored, even though under admittedly suspicious circumstances, is a departure from the accepted and usual course of procedure, and calls for this Court to exercise its power of supervision, and to correct such departure.

CONCLUSION

It is respectfully submitted that the questions raised here are of such importance in the administration of criminal law, particularly in the law relating to conspiracy and aiding and abetting, that there should be an authoritative determination thereof by this Court.

Accordingly, petitioner asks this Court issue a writ of certiorari to review the judgment of affirmance herein.

Dated, New York, August 21, 1957.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 394—October Term, 1956.

(Argued June 4, 1957 Decided July 9, 1957.)

Docket No. 24638

UNITED STATES OF AMERICA,

Appellee,

against

JOSEPH S. DEVIVO,

Appellant.

Before—MEDINA, LUMBARD and WATERMAN, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge.*

Defendant appeals from a judgment of conviction and concurrent sentences imposed for conspiracy to steal merchandise from a truck moving in interstate commerce and for the substantive offense of possessing such stolen merchandise with knowledge that it had been stolen, in violation of 18 U. S. C. Sections 371 and 659. Affirmed.

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (Robert W. Bjork and Robert Kirtland, Assistant United States Attorneys, New York City, of Counsel), for appellee.

DOUGLAS P. NULL, New York City, for appellant.

MEDINA, Circuit Judge:

Joseph S. DeVivo was found guilty by a jury on two counts of an indictment charging him with the substantive offense of possession of stolen merchandise with knowledge of the fact that it was stolen (Count 2) and with conspiracy to steal goods from a truck moving in interstate commerce (Count 3), in violation of 18 U.S.C. Sections 371 and 659; and he appeals from the judgment of conviction entered upon the verdict and from the two four-year concurrent sentences imposed upon him by Judge Weinfeld.

There is direct and uncontroverted evidence that on October 17, 1956, a large aluminum trailer truck containing 1787 cases of Vitalis Hair Tonic left the Bristol Laboratories, Inc. in Syracuse, New York, on its way in interstate commerce to the Bristol-Myers Company plant at Hillside, New Jersey. This trailer truck was, during the morning of October 18, 1956, parked at Pier 26, North River, New York City, stolen and driven away that same morning and later found abandoned in the Bronx. When the FBI closed in and made arrests on November 6, 1956 the stolen merchandise was found stored in the basement of premises owned by Mrs. Marguerite Schaefer at 3872 Boston Road, Bronx County, New York, not far from the place where the trailer truck was recovered.

A reversal of the judgment is sought because of the alleged insufficiency of the evidence to warrant the submission of the case against appellant on either the conspiracy count or on the one charging the substantive offense. It is also claimed that it was substantial and prejudicial error to receive the testimony of one Mucchiello over the objection of defense counsel. We find no merit in either of these contentions.

A recital of the sequence of events in chronological order will, we think, serve to clarify the simple issues involved and demonstrate the sufficiency of the evidence to sustain the conviction of appellant on both counts.

The Onondaga Freight Corporation was the carrier, and it had a small office at 79 Laight Street, New York City, three blocks from Pier 26, North River. At this office information was received of the forthcoming arrival of trucks from Syracuse and elsewhere and the necessary instructions for parking, routing and changing drivers were issued from this office. Sometimes the waybills were pushed under the door of this office and data concerning truck arrivals and other particulars were regularly received at this office over a teletype machine and these messages were hung on the wall of the office. A message concerning the arrival of the interstate shipment of Vitalis from Syracuse, showing the number of the trailer (234), its origin and destination, was received and posted in this manner at the Onondaga office and hangers-on or those seeking such information for illicit purposes had access to this message.

Truck drivers congregated in the vicinity and two in particular, Sam Perrone and Anthony J. Potenza were seen on numerous occasions in and about the premises prior to October 18, 1956 by the terminal manager of Onondaga, who testified at the trial. Another Onondaga

employee testified that he saw Perrone looking at the teletype on a prior occasion and told him to stop. After the theft, and in the afternoon of October 18, 1956, Perrone and Potenza were observed unloading the stolen cases of Vitalis from the truck at Mrs. Schaefer's premises.

There is, of course, no direct proof that those charged in the indictment (DeVivo, Pagano, Perrone and Potenza) observed the Onondaga operations and conspired to steal one of the trucks. But the essential data for such an undertaking were available to Perrone and Potenza, who became so obviously involved, by fingerprints and otherwise, that they and Pagano pleaded guilty to the second count of the indictment before the trial was over. The first count, charging the theft, was dismissed against all but Pagano.

On October 15, 1956, two days before the theft of the truck and its contents, John A. Pagano, using the assumed name "John Browitz," appeared at Mrs. Schaefer's premises and after some discussion rented the store in the basement, which was partly hidden by trees and shrubbery, as shown in one of the photographs in evidence, telling Mrs. Schaefer that he wanted the place "for storage and then probably later a restaurant." We shall see shortly that Pagano is the man who stole the loaded truck on the morning of October 18. A day or two after October 15 Mrs. Schaefer saw appellant DeVivo and Pagano together on her premises. As Pagano stole the truck on October 18 and Perrone and Potenza were observed that very afternoon unloading the cases of Vitalis and carrying them into the basement that Pagano had rented from Mrs. Schaefer on October 15, it requires little argument to demonstrate that there was a conspiracy on foot to steal the truck and appropriate its contents. If, as we shall see, there is satisfactory evidence connecting DeVivo with

this illegal transaction, there was basis for an inference by the jury that Pagano in anticipation of the theft, had rented the basement to store the loot, and that DeVivo came out with Pagano on October 16 or 17 to inspect the location to see whether it was suitable for their purposes.

On October 18, a short time after the truck had been parked at Pier 26 Pagano arrived, told the man in charge of the parking space, "I am taking Onondaga 234," which he proceeded to drive off. Putting two and two together, it was not, we think, an unwarranted inference, under the circumstances above described, that Perrone and Potenza had ascertained that this loaded truck, Onondaga 234, whose destination was Hillside, New Jersey, would arrive when it did arrive, and that this information was passed along to the other co-conspirators, including Pagano, in order to carry out the plan and take the merchandise to the place in the Bronx that had been hired for the purpose.

In the short interval between the lease of the basement on October 15 and the arrest of appellant and Pagano on November 6 Mrs. Schaefer saw appellant in and around her premises on at least seven or eight occasions, repeatedly in the company of Pagano who had introduced appellant as his "friend." But, after the arrest, appellant told the FBI men that he had only been at the house on Boston Road on two prior occasions, once two weeks earlier and again on a single occasion about a year previously. He said he had come to rent a room and had no knowledge of the theft or storage of the Vitalis.

In the latter part of October Mrs. Schaefer suspected trouble and told Pagano to vacate the store; she became more insistent after what happened on November 4, which is of crucial significance, both as establishing the participation of appellant in the conspiracy and as proof of aiding

and abetting and of his dominion and control, together with Pagano and the others, of the Vitalis stored at Mrs. Schaefer's place sufficient to sustain appellant's conviction on the substantive count charging possession of the stolen goods with knowledge that they were stolen.

The scene shifts to the evening of November 4, at a junk yard in Newark, New Jersey, where we find Pagano and appellant with a quantity of sundry drug supplies, consisting of shaving cream, Q-tips, talcum powder, hair tonic, shampoo, tooth paste and so on. According to the testimony of Mucchiello, which was received over objection, Pagano and appellant made a deal with him "to take the stuff over to the Bronx." An effort was made by the prosecution to prove that these drug supplies had been stolen, but the trial judge ruled this out. Although the Government maintains that such evidence should have been admitted, we have no occasion to consider the point. In any event, the trial judge's instructions on the subject were more than adequate to prevent any prejudice to appellant with respect to any inferences which might be drawn from the fact or even the possibility that these drug supplies had been stolen.

The significance of Mucchiello's testimony lies in the instructions he was given by Pagano and appellant and in appellant's conduct after Mucchiello arrived in the vicinity of the place where the Vitalis was stored. Pagano and appellant did not instruct Mucchiello to take the drug supplies in his truck directly to Mrs. Schaefer's place; they did not even give him her address. But either Pagano or appellant, in the other's presence, wrote a note, with the words "Gun Hill Road and Boston Post Road" and the telephone number "Tulip 2-9777," which was the pay telephone at Mrs. Schaefer's. Accordingly, Mucchiello proceeded to Gun Hill Road and Boston Post Road, called up

the number he had been given; and about five minutes later Pagano and appellant arrived in an automobile. Pagano got in the truck with Mucchiello, and appellant led the cavalcade to Mrs Schaefer's place, a few blocks away.

Pagano asked Mrs. Schaefer "if he could use a room upstairs to case some goods for a couple of hours," she acquiesced, the drug supplies were unloaded, and, before returning to Newark, Mucchiello told Pagano he had noticed a suspicious looking Nash in the neighborhood, but Pagano passed this off. A number of unidentified men were in the room where the drug supplies had been taken, and Mrs. Schaefer outside the room heard someone say "There's a suspicious looking Na h," and "it looks like the law."

Events moved swiftly thereafter. Mrs. Schaefer insisted that all the "stuff" be taken away; there was much telephoning back and forth; a truck was coming and then it was not; and, in the midst of all this, on November 6, Pagano and appellant arrived and were taken into custody.

We think the evidence of appellant's participation in the conspiracy too clear for further discussion. Viewing appellant's conduct in the setting above related we also hold that there was adequate proof to justify the submission of the substantive count to the jury.

As to Mucchiello's testimony, we think this was relevant and of considerable probative force on the issue of whether appellant exercised dominion and control over the stolen goods or aided others in the exercise of such dominion and control.

Affirmed.